STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM E. SIVER, Individually and as Next Friend of KATY SIVER, a Minor, and SHERRY SIVER,

Plaintiff-Appellants,

v

RICHARD P. CAMPBELL and LORI CAMPBELL,

Defendant-Appellees.

UNPUBLISHED
March 30, 2001

No. 218287
Oakland Circuit Court
LC No. 98-005016-NO

Before: Hoekstra, P.J., and Whitbeck and Meter, JJ.

PER CURIAM.

In this premises liability case, plaintiffs appeal as of right from the trial court's order granting summary disposition to defendants Richard and Lori Campbell. We affirm.

I. Basic Facts And Procedural History

The Campbells own an above-ground swimming pool with a water depth of approximately three feet, eight inches. In spring 1996, the Campbells installed a deck adjacent to the pool. Twelve-year-old Katy Siver and her mother, Sherry Siver, visited the Campbell's home often, between two and four times a week. Katy Siver swam in the pool two to three times a week during that summer. One evening in July 1996, Sherry Siver went to the Campbell's home with her daughters, Katy and Chelsea Siver. The two Siver children, along with the Campbell's two daughters, began swimming in the pool. Approximately twenty minutes later, Katy Siver dove off the wooden deck into the pool, her hands hit the bottom of the pool, jolting her neck. Katy Siver later said that she had been attempting to do a "shallow dive," but miscalculated and did a "deep dive." Following the dive, Katy Siver floated to the top of the water and was unable to move her body. Richard Campbell heard the children screaming for help, ran outside, and saw Katy Siver floating face down in the pool. He jumped in the pool and lifted her face out of the water. Sherry Siver, who had rushed to the pool, then helped Richard Campbell lift Katy Siver out of the water and onto the pool deck. Katy Siver was taken to the hospital, where she stayed six weeks recuperating from the accident. She left the hospital wearing a halo brace, but, fortunately, was not paralyzed.

In May 1998, plaintiffs filed a complaint alleging that Katy Siver was seriously and permanently injured as a result of the Campbells' failure (1) to warn her of the dangers of diving or jumping into their pool, (2) to supervise the children adequately while they were in the pool, (3) to instruct the children not to jump or dive into the pool, and (4) to make the premises and pool reasonably safe.

After taking deposition testimony, the Campbells moved for summary disposition under MCR 2.116(C)(8) and (10). After a hearing in February 1999, the trial court concluded that Katy Siver was a licensee and that the Campbells had no duty to warn her of the danger the pool posed because the danger was open and obvious. Additionally, the trial court determined that the Campbells had no duty to supervise Katy Siver because her mother was present at the time of the accident. Consequently, even though the trial court did not specify whether the Campbells had succeeded under MCR 2.116(C)(8) or (10), it nevertheless granted the Campbells' motion for summary disposition.[1] Although the trial court did not explicitly comment on the Campbells' alleged duty to make the pool safe, it is clear from the order the trial court entered that it had concluded that none of the theories of liability survived summary disposition.

On appeal, the questions the Sivers present challenge the trial court's determination that, under the law, Katy Siver should be treated as a licensee, not an invitee, and that the Campbells did not have a duty to warn, supervise, or make the pool safe in this case. However, the Sivers do not make a substantive argument concerning the Campbells' alleged violation of the duty to make the premises safe. Thus, we consider that issue waived for appeal.[2]

II. Standard Of Review

Appellate courts apply review de novo to a trial court's order granting or denying a motion for summary disposition.[3]

III. Legal Standard

A motion for summary disposition may be granted when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."[4] A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.[5] The trial court must consider all the evidence the parties submit[6] in the light most favorable to the nonmoving party.[7] "Where the proffered evidence fails

[1] We are certain that the trial court concluded that summary disposition was proper under MCR 2.116(C)(10) because it did not constrict its analysis to the pleadings, but instead looked at the record as a whole. See MCR 2.116(G)(5).

[2] *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

[3] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[4] MCR 2.116(C)(10).

[5] *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

[6] MCR 2.116(G)(5).

[7] *Maiden*, *supra* at 120.

to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law."[8] However, the nonmoving party must present more than mere allegations in order to demonstrate that there is a genuine issue of material fact in dispute, making trial necessary.[9]

IV. Katy Siver's Legal Status

The Sivers contend that, because she was a minor requiring greater protection, the trial court should have concluded that the Campbells owed Katy Siver the higher duty of care they would owe an invitee rather than the lower duty of care they would owe a licensee. Michigan still adheres to the distinctions between the status of visitors, who may be trespassers, licensees, or invitees, when determining the duty a landowner owes a visitor injured on the premises.[10]

> A "trespasser" is a person who enters upon another's land, without the landowner's consent. The landowner owes no duty to the trespasser except to refrain from injuring him by "wilful and wanton" misconduct.
>
> A "licensee" is a person who is privileged to enter the land of another by virtue of the possessor's consent. A landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved. The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit. *Typically, social guests are licensees who assume the ordinary risks associated with their visit.*
>
> The final category is invitees. An "invitee" is "a person who enters upon the land of another upon an *invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make [it] safe for [the invitee's] reception.*" The landowner has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards. Thus, an invitee is entitled to the highest level of protection under premises liability law.[11]

Whether Michigan law would place certain social guests in the invitee category simply by virtue of their age, thereby entitling them to greater protection, is not clear from the case law.

---

[8] *Id.*

[9] MCR 2.116(G)(4); *Etter v Michigan Bell Telephone Co*, 179 Mich App 551, 555; 446 NW2d 500 (1989).

[10] *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000).

[11] *Id.* at 596-597 (emphasis added).

For instance, the Sivers note that this Court commented in *Klimek v Drzewiecki*[12] that, in *Preston v Sleziak*,[13] the Supreme Court held that "that in this jurisdiction the adult social guest is to be viewed as a licensee" and that in *Moning v Alfono*[14] the Supreme Court commented that "[s]pecial rules for children are not unusual." Notably, however, the facts of *Preston* did not involve injuries to any minor social guests and, therefore, the suggestion that another rule might apply to minor social guests was obiter dictum.[15] Additionally, because *Moning* involved products liability, not premises liability, the case did not address the distinctions between the three classes of visitors. Thus, even if this Court's holding in *Klimek* that landowners owe a duty "to a child social guest to exercise reasonable or ordinary care to prevent injury to the child" can be interpreted to place minor social guests in the invitee category, rather than creating a special subcategory of licensee that requires more care than would be afforded to an adult social guest but less care than used with invitees, this holding may not be on particularly firm legal ground. Fortunately, clarifying Katy Siver's legal status at the time of the accident is not critical to resolving this appeal, as the discussion, below, indicates.

V. Failure To Warn

The key to the trial court's reasoning that the Campbells did not have a duty to warn Katy Siver about the pool or the danger of diving was its conclusion that the dangers the pool posed were open and obvious. The "no duty to warn of open and obvious dangers" doctrine, which applies both to premises liability[16] and products liability,[17] effectively bars liability if the plaintiff knew of the dangers or if they were "so obvious" the plaintiff could "reasonably be expected to discover them," unless the defendant "should anticipate the harm despite knowledge of it on behalf of the" plaintiff.[18] This defense applies even when the plaintiff is an invitee and entitled to the highest degree of care.[19] Thus, for the sake of our de novo analysis, we assume that the Sivers' argument concerning Katy Siver's legal status at the time of the accident is correct and that she was entitled to the protection ordinarily afforded an invitee.

Products liability case law holds that an above-ground swimming pool is a simple product that poses an open and obvious risk of harm from diving into its shallow waters,[20] even when the

---

[12] *Klimek v Drzewiecki*, 135 Mich App 115, 118-120; 352 NW2d 361 (1984).

[13] *Preston v Sleziak*, 383 Mich 442, 453; 175 NW2d 759 (1970), overruled on other grounds by *Stitt*, *supra* at 603.

[14] *Moning v Alfono*, 400 Mich 425, 445; 254 NW2d 759 (1977).

[15] See *Preston*, *supra* at 444; see also *People v Kevorkian*, 205 Mich App 180, 190, n 6; 517 NW2d 293 (1994).

[16] *Riddle v McLouth Steel Products*, 440 Mich 85, 90-97; 485 NW2d 676 (1992).

[17] *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 385; 491 NW2d 208 (1992).

[18] *Riddle*, *supra* at 96.

[19] See *Weakley v City of Dearborn Heights*, 240 Mich App 382, 385; 612 NW2d 428 (2000).

[20] *Glittenberg (On Rehearing)*, *supra* at 399.

injured diver is a minor.[21] Thus, if this were a products liability case, summary disposition would have been proper regardless of Katy Siver's age.

We have been able to find only one published Michigan premises liability case involving the open and obvious danger doctrine that addresses the duty a landowner has to a minor: *Pigeon v Radloff*.[22] In *Pigeon*, the defendant's son invited the minor plaintiff to swim in their above-ground swimming pool while the defendants were away from home.[23] The plaintiff injured himself by diving into the shallow water, causing him to become quadriplegic.[24] The plaintiff sued the defendants, alleging that they were negligent for failing to warn him that it was dangerous to dive into the pool and for failing to supervise him while he used the pool.[25] The trial court granted the defendant's motion for summary disposition.[26] On appeal, this Court noted that a landowner's duty to a licensee depends on whether the licensee is an adult or a child.[27] The Court reasoned that the duty to a child licensee is higher than the duty to an adult licensee because children do not always appreciate a risk posed by a danger, even if the danger is open and obvious.[28] The Court held

> that when a child licensee is injured by something that is or may be an open and obvious danger to an adult, summary disposition based on [the] open and obvious danger rule is inappropriate as a matter of law unless the trial court can say from the undisputed evidentiary facts that all reasonable persons would agree that the child licensee did or could have been expected to realize the risk involved. It is therefore generally a question for the jury to determine whether a child licensee appreciates the full extent of the risk involved with an open and obvious danger.[29]

Despite the plain similarities between the diving injuries in *Pigeon* and this case, including the fact that both plaintiffs were injured as minors, we cannot apply *Pigeon* in this case because the Supreme Court has directed that it has "no precedential force or effect."[30] Thus, we are left with a void in the law concerning the duty to warn a child licensee of a danger.

---

[21] *Mallard v Hoffinger Industries, Inc*, 210 Mich App 282, 284-286; 533 NW2d 1 (1995), vacated in part on other grounds 451 Mich 884 (1996).

[22] *Pigeon v Radloff*, 215 Mich App 438; 546 NW2d 655 (1996).

[23] *Id*. at 440.

[24] *Id*.

[25] *Id*. at 441.

[26] *Id*.

[27] *Id*., citing *Preston, supra*.

[28] *Pigeon, supra* at 443-444, citing the comment accompanying 2 Restatement Torts, 2d, § 342, p 210.

[29] *Pigeon, supra* at 444-445.

[30] *Pigeon v Allied Pools & Spas*, 451 Mich 885, 885; 549 NW2d 574 (1996).

Again, however, we can resolve this question by assuming that the Campbells were obligated to take the strictest precautions to protect Katy Siver. The only evidence on the record that the Sivers claim created a question of fact that should have gone to trial was the proposed expert testimony, provided at that early stage of the proceedings in the form of an affidavit by Thomas C. Ebro, an aquatic safety specialist. Among his many assertions, Ebro averred that Katy Siver did not adequately appreciate the dangers and risks posed by the Campbells' pool, the absence of warnings violated safety standards, and the Campbells' deck encouraged diving. Critically, this affidavit directly contradicted the Sivers' deposition testimony, which indicated that Katy Siver had dived in the Campbells' pool on several previous occasions, she knew it was dangerous to do a "deep dive" into the Campbells' pool, and that she was attempting to do a "shallow dive," but miscalculated, when she was injured. This testimony demonstrates that Katy Siver understood the dangers of diving into this shallow, above-ground pool, and that she specifically assumed the risk of those dangers when she executed the dive that injured her.

Ebro, who has a bachelor's degree in recreation management and aquatics administration, offered no explanation whatsoever that would explain his insight into what Katy Siver knew or believed at the time of the accident. While he may be well-qualified to render an expert opinion on the design, construction, and operation of the Campbells' pool, he has no apparent qualification to formulate the opinion "[t]hat the minor, Katy Siver, at the time of the incident did not adequately appreciate the dangers and risks posed by the above ground pool . . . ." He does not purport to have any special training in psychology or other related field that would allow him to have insight into her state of mind and thought processes, much less to have insight to a degree that would contradict her testimony.

To the extent that Ebro intended to imply that Katy Siver, like most casual pool users, did not understand the physical conditions and natural forces that made the risk of diving into the Campbells' pool dangerous, he did not say so. Further, regardless of a diver's technical understanding of why a shallow dive might be necessary and the likelihood that a shallow dive might not be possible to execute, the Supreme Court has already concluded that an injured diver's admission of "the necessity to perform a shallow dive simply underscores the conclusion that the risk of diving in shallow water is open and obvious."[31] Katy Siver made just such an admission in her deposition testimony. All reasonable minds would agree that Katy Siver realized the risk involved when she dove into the Campbells' pool. Consequently, even assuming that Katy Siver should have been protected like an invitee, Ebro's affidavit failed to establish that a question of fact existed concerning whether the Campbells failed to exercise reasonable care to prevent Katy Siver's injury when they failed to warn her of the dangers their swimming pool posed, making summary disposition appropriate.[32]

VI. Failure To Supervise

Plaintiffs also argue that Ebro's affidavit, in which he attributed the accident to the Campbells' failure to supervise the swimming activities, and Lori Campbell's deposition

---

[31] *Glittenberg*, *supra* at 401.

[32] MCR 2.116(G)(4).

testimony, in which she stated that she and her husband violated their own rules by failing to supervise the children while they were swimming, were enough to establish a question of fact regarding the failure to supervise claim. Nevertheless, this Court, in *Bradford v Feeback*,[33] held that, "as a matter of public policy, property owners should not be charged with the duty of supervising and controlling children of guests who have been invited onto the property." The evidence on the record reveals that Sherry Siver was present at the time Katy Siver was injured. Therefore, Sherry Siver, not the Campbells, had the duty to supervise Katy Siver in the swimming pool at the time of the accident.[34] As a matter of law, the Campbells did not have a duty to supervise Katy Siver. Accordingly, summary disposition pursuant to MCR 2.116(C)(10) was proper for the Siver's failure to supervise claim.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Patrick M. Meter

---

[33] *Bradford v Feeback*, 149 Mich App 67, 71-72; 385 NW2d 729 (1986).

[34] This Court in *Pigeon*, *supra* at 445-446, distinguished the facts with which it was presented in that case from the facts in *Bradford*, noting that there was no evidence that the minor plaintiff's parents were on the premises at the time he sustained his injury in the swimming pool. Even if *Pigeon* had any precedential value, it would not apply in this case.